In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 449

JAMES JUDE TAGLIA, PETITIONER

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is not yet reported. The order of the district court (Pet. App. B 1–2) is not reported. The memorandum opinion and determination of the Central Industrial Personnel Access Authorization Board, Department of Defense (Pet. App. C), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1970. The petition for a writ of certiorari was filed on July 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the right of confrontation or otherwise denied a fair hearing in the administrative proceedings which resulted in revocation of his security clearance.

STATEMENT

Petitioner's security clearance, which he had held as a civilian employee of the Philco Corporation, a defense contractor, was suspended in 1963 and, following extensive administrative hearings, was ultimately revoked under the Industrial Personnel Security Clearance Program administered by the Department of Defense pursuant to the provisions of Executive Order 10865, 25 Fed. Reg. 1583 (Pet. 3–7), and Department of Defense Directive 5220.6, 25 Fed. Reg. 14392, as amended, 31 Fed. Reg. 16188 (Pet. 7–14).[1]

In essence, the charges which led to the revocation were that, in January 1962 and again in March 1962, petitioner mishandled classified documents at his place

[1] The Executive Order and these administrative regulations were promulgated after this Court held in *Greene* v. *McElroy*, 360 U.S. 474, that the then-existing security clearance procedures, which had not been authorized by the President or Congress, were defective in failing to provide the safeguards of confrontation and cross-examination.

The present security clearance procedures, which provide for the rights to confrontation and cross-examination at the hearing, are outlined in our Brief in Opposition in *Shoultz* v. *Laird*, No. 544, O.T. 1969, pp. 2–4 (certiorari denied, 396 U.S. 962). We are providing petitioner's counsel with a copy of that Brief in Opposition. These procedures were also upheld, in a somewhat different context, in *Adams* v. *Laird*, 420 F.2d 230 (C.A. D.C.), certiorari denied, 397 U.S. 1039.

of employment and made false statements concerning his handling of them (see Pet. App. C 4–5). Extensive evidence was adduced by both sides. The evidence showed, and the Board found, that petitioner had cut portions from the January classified document which indicated its classified nature and had never returned the document to its proper source (see Tr. 804–809, 821, 952),[2] and that petitioner improperly procured the March document, failed to report and record its receipt, and caused its reproduction without authority (see, *e.g.*, Tr. 809–810, 812, 816, 820, 956, 958–963, 1388, 1390, 1391).

The district court upheld the administrative decision. With reference to the issues relevant here, it ruled that "the administrative procedures provided a full and fair hearing with ample opportunity to cross-examine witnesses" in compliance with *Greene* v. *McElroy*, 360 U.S. 474; that while the "hearing officer may have been unable to compel testimony on cross-examination as to certain questions," petitioner

[2] "Tr." designates the 20-volume transcript of the administrative hearings conducted on 21 days in 1963 and 1964. These volumes contain the testimony of twenty-five witnesses and run to more than 2900 pages. They and other pertinent papers have been lodged with the Clerk of this Court.

[3] In the district court this case was consolidated with *Leo George Becker* v. *Laird*. The proceedings against Becker were based upon his participation in the same events and also resulted in revocation of his "top secret" Industrial Security Clearance. He also brought suit against the Secretary of Defense; the district court denied his motion for summary judgment and rendered judgment in favor of the Secretary of Defense. An appeal was taken by Becker, but was not pursued and the court dismissed his appeal on November 17, 1969.

failed to make any motion to strike the testimony of such witness; and that, in any event, "the findings are supported by ample evidence," excluding consideration of the testimony of any witness who refused to answer questions on cross-examination (Pet. App. B 1–2). The court of appeals affirmed *per curiam*, noting its "general agreement" with the reasoning of the district court (Pet. App. A 1).

ARGUMENT

The courts below properly upheld the administrative determination, and there is no reason for further review.

The only items which certain witnesses failed to produce or testify about were: a letter Miss Poole, a security employee at Philco, had written in July 1962 to Mr. Trainsue, Philco's Security Director relating to alleged security violations (Tr. 244–245, 309); Mr. Trainsue's report of his investigation prompted by his dealings with Miss Poole (Tr. 310–311); portions of the "Berry Memorandum"[1] and the March 1962 classified document. Petitioner, however, did not attempt to build his case on these documents, nor was his presentation hindered by the refusal of the witnesses to discuss what essentially were peripheral

[1] Mr. Berry, who testified at the administrative hearing, was an attorney for Philco. The "Memorandum" refers to his report to his superiors at Philco of a conference at the Philco office in Philadelphia on August 22, 1962, at which alleged security violations were discussed (see Tr. 475–476; Gov. Ex. A–2).

matters.[7] Petitioner thoroughly cross-examined these witnesses at length on the central issue of whether, in fact, he had handled the documents in violation of applicable regulations.[8]

Indeed, petitioner's failure to move to strike the testimony of these witnesses strongly suggests that he did not deem their silence on these points crucial to his case. See, *e.g.*, *Adams* v. *Laird*, 420 F. 2d 230, 238 (C.A. D.C.), certiorari denied, 397 U.S. 1029; *Stephan* v. *United States*, 133 F. 2d 87, 97 (C.A. 6), certiorari denied, 318 U.S. 781; 5 Wigmore, *Evidence* (3rd ed. 1940) § 1391. Although petitioner contends that he "in effect moved to strike" this testimony (Pet. 27), his reference is not to anything that occurred at the hearing at which the evidence was adduced but is to his oral argument to the appeal board. There was, in short, confrontation and full cross examination of all witnesses on the salient issues, in compliance with the requirements of *Greene* v. *McElroy*, 360 U.S. 474.

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[7] It seems a fair assumption that the witnesses refused to discuss the Poole, Transue and Berry documents which all related to the internal operations of Philco [sic] in pending libel suits brought by petitioner against Miss Poole and Philco on the day before the administrative hearing commenced. The suit against Miss Poole was dismissed and no appeal was taken. Judgment in the other suit was for Philco. See *Tomlin* v. *Philco Corp.*, 372 F. 2d 774 (C.A. 4), certiorari denied *sub nom. Becker* v. *Philco Corp.*, 389 U.S. 979.

As to the March 1962 classified document, petitioner's rights were fully protected by his opportunity to cross-examine F.B.I. agent Byrnes, who compared that document with the original "secret" document in the Pentagon (Tr. 184).

[8] For example, cross-examination of Mr. Transue consisted of 134 pages, of Mr. Berry 122 pages and of Miss Poole 255 pages.

We point out finally that the government—as both courts below held—amply established its case wholly apart from the attenuated matters of which petitioner now complains (see the brief for appellee in the court of appeals, particularly pp. 3–12, 20–21, which we are filing herewith).[*]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1970.

[*] Although petitioner complains that he was denied the power to compel the attendance of witnesses by subpoena, he has made no showing that he did not have the benefit of all witnesses he wished to have participate at the hearing. No subpoena power exists in these proceedings.

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